

Public sector whistleblowing: Stage 2 reforms

Submission to the Attorney-General's Department

20 December 2023

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the Federal Government's second stage of public sector whistleblowing reform, through the ongoing consultation being conducted by the Attorney-General's Department.
2. This submission will respond to the consultation paper released by the Attorney-General's Department in November 2023, entitled *Public sector whistleblowing reforms Stage 2 – reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers* ('Consultation Paper').
3. The ALA maintains our long-held belief that the protection of whistleblowers is essential for promoting integrity, accountability and trust in both public and non-public institutions. Public sector whistleblowers perform an important function for the community, ensuring that public officials can truly be held to account if they are not operating within the confines of the law. Private sector and not-for-profit sector whistleblowers perform similarly significant functions in those respective domains. Comprehensive protections for whistleblowers are essential to support whistleblowers, to keep them safe, and to prevent reprisals.
4. The ALA welcomed and engaged in stakeholder consultation on the Federal Government's public whistleblowing reforms earlier in 2023.² The ALA contends that there are still further, crucial reforms required to adequately protect whistleblowers under the *Public Interest Disclosure Act 2013 (Cth)* ('PID Act').
5. The ALA's submission will address the following:
 - a. Alignment of whistleblowing schemes;
 - b. Making a disclosure within government;
 - c. Protections and remedies under the PID Act; and
 - d. Consideration of a potential Whistleblower Protection Authority or Commissioner.
6. The ALA also acknowledges the dedicated research, work and modelling undertaken on whistleblowing reforms by the Human Rights Law Centre.

² See, eg, Australian Lawyers Alliance, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Public Interest Disclosure Amendment (Review) Bill 2022* (19 January 2023) <www.lawyersalliance.com.au/documents/item/2391>.

Alignment of whistleblowing schemes

7. The ALA notes the following from the Consultation Paper:³

The second stage of reforms to the PID Act will include consideration of recent proposals to improve the private sector whistleblowing scheme in the Corporations Act, to ensure alignment between the schemes, where appropriate. Consultation on the public sector whistleblowing framework also provides an opportunity to identify lessons for whistleblowing frameworks more broadly and inform future consultations or reviews for other federal whistleblowing frameworks.

8. The ALA supports reforms which improve whistleblower protections across the board – whether those whistleblowers are operating in the public sector, the private sector or the not-for-profit sector.
9. The ALA also supports alignment between whistleblowing schemes to ensure that whistleblowers from one sector, industry or government agency/program do not have greater or fewer protections than whistleblowers in another sector, industry or government agency/program. This imbalance characterises the reality facing whistleblowers in Australia today, which the ALA maintains is an unfair and unsustainable situation.
10. **Ultimately, the ALA recommends that the Federal Government harmonises whistleblower protections between all legislative schemes and between public, private and not-for-profit sectors into a single and consistent legislated whistleblower protections framework.**
- a. This will provide clarity to all whistleblowers as to their rights and protections.
 - b. The ALA submits that developing one legislated whistleblower protections framework for federal whistleblowing will also be more cost-effective. This is especially evident when one considers the current practice of needing to analyse multiple frameworks to assess to what protections a particular whistleblower is presently entitled, as well as the need to update multiple pieces of legislation, regulations, guidelines, internal departmental policies, training programs and other government resources when whistleblowing reform is undertaken.

³ Attorney-General's Department, Australian Government, *Public sector whistleblowing reforms Stage 2 – reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers* (Consultation Paper, November 2023) 7.

Making a disclosure within government

11. This section of the ALA's submission addresses the matters and questions raised on pages 9 to 11 of the Consultation Paper.
12. The ALA supports reforms to the PID Act to ensure the following is realised:
 - a. **Individuals employed under the *Members of Parliament (Staff) Act 1984 (Cth)* ('MoP(s) Act') should have access to full public sector whistleblower protections under the PID Act.** The current reliance on protections being afforded to the staff of parliamentarians through the National Anti-Corruption Commission (NACC) is effective only to the extent that disclosures are focused on matters of corruption. Whistleblowers who are staff employed under the MoP(S) Act and who make disclosures on other matters are being left without adequate or accessible protections.
 - b. **If a government agency is not the appropriate recipient of a whistleblower's disclosure, then that government agency should be obliged to refer that whistleblower directly to the appropriate agency.** The onus should not be on the whistleblower to find another government agency who will process their disclosure.
 - c. **Protections under the PID Act should be automatically triggered by a whistleblower making disclosures to an agency to whom that whistleblower would logically report such wrongdoing.** This would include reporting to integrity agencies.

Protections and remedies under the *Public Interest Disclosure Act 2013 (Cth)*

13. This section of the ALA's submission addresses the matters and questions raised on pages 16 to 19 of the Consultation Paper.
14. The ALA supports reforms to the PID Act to ensure the following occurs when processes and protections fail whistleblowers:
 - a. **The PID Act should mirror international best practice by reflecting a reverse onus of proof,** whereby an agency or individual allegedly responsible for failing a

whistleblower bears the onus of proof (instead of the whistleblower) when a whistleblower is seeking civil remedies, including compensation.

- b. **The ALA submits that compensation and other civil remedies, must be available for whistleblowers in a range of instances**, including where detriment flows from a failure for an agency or individual to follow required procedures, or to fulfil a duty to support or protect a whistleblower. This should include civil remedies for negligent or ‘collateral’ damage, regardless of the intent of agency’s representative(s) or other individual(s) responsible.
- c. **PID Act protections should apply to all necessary and/or reasonable actions relating to a whistleblower’s disclosure, including preparatory acts.**

Consideration of a potential Whistleblower Protection Authority or Whistleblower Protection Commissioner

- 15. This section of the ALA’s submission addresses the matters and questions raised on pages 20 to 23 of the Consultation Paper, specifically regarding a potential Whistleblower Protection Authority or Whistleblower Protection Commissioner.
- 16. The ALA notes that there is currently no independent source to whom whistleblowers can turn for support and protection when internal processes within federal agencies and institutions fail to protect whistleblowers, or when whistleblowers fall through the cracks of the insecure whistleblower protections frameworks.
- 17. **The ALA thus supports calls for the establishment of a Whistleblower Protection Authority or a Whistleblower Protection Commissioner.**
- 18. The merits of establishing a Whistleblower Protection Authority have been discussed at parliamentary inquiries since the 1990s.⁴ That includes in 2017, when the Parliamentary Joint Committee on Corporations and Financial Services made several recommendations regarding

⁴ Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections* (Final Report, 14 September 2017) Recommendation 12.1.

the establishment of a Whistleblower Protection Authority to cover both public and non-public arenas.⁵ More recently, a Whistleblower Protection Commissioner has been proposed.⁶

19. The ALA supports the following attributes underscoring the establishment of a Whistleblower Protection Authority or Commissioner:

- a. That the Whistleblower Protection Authority or Commissioner would be an independent statutory agency/entity;
- b. That the Whistleblower Protection Authority or Commissioner would be able to enforce whistleblower protections in all sectors, as recommended by the Parliamentary Joint Committee on Corporations and Financial Services;⁷
- c. That a whistleblower who has made a disclosure (under the PID Act or otherwise) should be able to seek advice or support from the Whistleblower Protection Authority or Commissioner;
- d. That an individual who is considering making a disclosure (under the PID Act or otherwise) should be able to seek advice or support from the Whistleblower Protection Authority or Commissioner, which could direct that individual to the appropriate agency for making their disclosure;
- e. That the Whistleblower Protection Authority or Commissioner would offer oversight over compliance with whistleblower protections, as well as ongoing monitoring in relation to matters involving disclosures; and
- f. That the Whistleblower Protection Authority or Commissioner could also contribute to education, training and general guidance on whistleblowing matters, as well as to provide recommendations to the Federal Government on what reforms may be needed to improve or clarify elements of federal whistleblowing laws.

⁵ Ibid 158–163.

⁶ Australian Federal Integrity Commission Bill 2021 (Cth) div 2, cl 17.

⁷ Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections* (Final Report, 14 September 2017) 158–163.

Conclusion

20. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into this consultation on whistleblowing reforms, including within the public sector.

21. The ALA is available to provide further assistance to the Federal Government and to the Attorney-General's Department on the issues raised in this submission.

A handwritten signature in black ink, appearing to read 'Shaun Marcus', is positioned above the typed name.

Shaun Marcus

National President,

Australian Lawyers Alliance